Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ADELE BUZZETTI d/b/a COZY CABIN, and VANESSA DOE, the first and last names being fictitious,

Petitioners,

-v.-

THE CITY OF NEW YORK, THE DEPARTMENT OF CITY PLANNING, THE DEPARTMENT OF BUILDINGS, THE NEW YORK CITY COUNCIL, and RUDOLPH W. GIULIANI, JOSEPH B. ROSE, and GASTON SILVA, in their official capacities,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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June 25, 1998

COUNTER-QUESTIONS PRESENTED

1. Based on the controlling principles in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), is the challenged adult use zoning ordinance facially valid under the First and Fourteenth Amendments of the United States Constitution where the courts below correctly held that defendants demonstrated that it is content-neutral and not discriminatory on the basis of gender and is narrowly tailored to serve important governmental interests?

2. Whether plaintiffs failed to demonstrate that there is an impermissibly gender-based classification in the challenged adult use zoning ordinance in violation of the Equal Protection Clause where, as the courts below correctly recognized, the definitional terms parallel definitions in adult use zoning ordinances throughout the country, including the ones upheld by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 53 (1976) and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 44 (1986), and are based upon legislative consideration of the well-documented negative secondary effects attributable to certain adult establishments?

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COUNTER-STATEMENT OF THE CASE

Respondents, the City of New York, *et al.*, respectfully request that this Court deny the petition by petitioners Adele Buzzetti, *et al.* ("petitioners" or "Buzzetti"), for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered March 20, 1998. Upon review of that opinion (App. A, 1a-22a),[1] petitioners do not raise any legal issue deserving this Court's review.

The Second Circuit's opinion, which affirmed a judgment of the United States District Court for the Southern District of New York, is reported as *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir. 1998), *stay denied*, 1998 U.S. LEXIS 4006 (June 15, 1998) (App. A, 1a-22a). The District Court's opinion is reported as *Buzzetti v. City of New York*, _F. Supp._, 1997 U.S. Dist. LEXIS 4383 (S.D.N.Y. Apr. 8, 1997) (App. B, 23a-37a).

In rejecting petitioners' gender bias and equal protection claims based on governing precedent from this Court, the courts below correctly held that the City's adult use zoning ordinance is a content-neutral ordinance that imposes a measured and appropriate set of land use restrictions on those types of adult establishments that have been shown in numerous studies to produce negative secondary impacts on the communities in which they are located. Topless bars featuring female entertainers are among the types of establishments that have been associated with such impacts and bars featuring topless male entertainers have not been. Therefore, the Zoning

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[1] Numbers and letters in parentheses preceded by "App." refer to the Appendix to the Petition for a Writ of Certiorari. Numbers in parentheses preceded by "JA__" refer to pages in the Joint Appendix submitted to the Second Circuit Court of Appeals.

Amendment does not violate the First Amendment and does not unlawfully discriminate on the basis of gender or violate the Equal Protection Clause, but rather is narrowly tailored to achieve its legitimate ends.

Background of New York City's Adult Use Zoning Amendment.

The background facts are summarized in the Court of Appeals' opinion (App. 3a-9a; *see also* 24a-27a). In brief, the extensive legislative record leading up to the passage of the Amendment to the New York City Zoning Resolution governing adult use establishments ("the Amendment") illustrates the careful study behind, and the reasonableness of, the Amendment.

Thus, in recent years, New York City, like many other localities, witnessed a significant increase in the number of establishments offering sexually-oriented adult entertainment (JA288). Such establishments include adult book and video stores, which often provide booths for on-premises viewing, adult theaters, which may offer movies or live entertainment, and topless or nude bars (JA288). Once found predominantly in Times Square and a few other areas, adult establishments more recently opened and proliferated in neighborhoods where they had not previously been located, including numerous triple-X video stores and nude bars in or near residential neighborhoods in the City, such as Chelsea in Manhattan, Sunset Park in Brooklyn, and Sunnyside and Forest Hills in Queens (JA288, JA72).

Prior to November 1994, the City's Zoning Resolution did not distinguish between adult establishments and other commercial activities (JA288-89). In response to concerns

expressed by citizens and their elected representatives about the proliferation of adult establishments and their adverse impacts, the City's land use planning bodies, the Department of City Planning ("DCP") and the City Planning Commission ("CPC"), conducted a thorough analysis of whether the City should adopt zoning regulations directed at adult establishments (JA288-89).

The DCP's Adult Entertainment Study ("the DCP Study") was completed in the fall of 1994 (JA44-134). It contains a survey of adult use studies performed by many other municipalities and the adult use zoning regulations they have adopted, including studies by the Town of Islip, New York; Los Angeles; Indianapolis; Phoenix; Austin, and a 1989 report of the Minnesota Attorney General (JA291-97, JA57-63, JA89-111).

The DCP Study also reviews previous studies in the City (JA293-95, JA89-101), such as a 1993 Chelsea Business Survey, indicating the negative impacts on Chelsea businesses of the recent proliferation of triple-X video stores and peep shows (JA294, JA215-41), and a 1994 Times Square Business Improvement District "(TSBID") Study of adult uses in Times Square (JA295, JA135-95). Finally, the DCP Study includes DCP's own survey of the impacts that even isolated adult establishments have had (JA289, JA44-144), including DCP's survey of selected study areas and of real estate brokers and community organizations (JA296-97, JA102-19).

Based on all these sources, the DCP Study concluded that the negative secondary effects of adult establishments constituted a serious and growing problem in New York City and therefore recommended special zoning restrictions (JA297,

JA120-21). As detailed in the Second Circuit's opinion, the DCP Study (App. 4a; *see* JA291-93, JA57-63):

> noted that studies from other cities had documented numerous "negative secondary impacts of such establishments, including "increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life." DCP Study at 67. These effects were consistent with the experience of those areas of New York City marked by high concentrations of adult entertainment establishments, the study concluded. Even in areas where adult establishments were not heavily concentrated, residents, businesses, and community leaders feared the consequences of possible future proliferation. . . .

After the City Council approved a one-year interim zoning moratorium in November 1994, the Council's Land Use Committee filed a joint land use review application in March 1995 to amend the Zoning Resolution to create permanent adult use regulations (JA297-98). Following thorough public comment and hearings, on September 18, 1995, the CPC approved the proposed comprehensive regulations (JA301, JA336).

The CPC's Report details the underlying planning considerations and bases for its findings, including the DCP Study, the TSBID Study, the Chelsea Business Survey, and various public testimony (JA313, JA334-50). It found that the "deleterious" secondary effects of adult establishments had "gone unchecked for too long a time," and were aggravated by the recent proliferation of adult uses, including in neighborhood retail and residential areas which historically did

not have such uses. The CPC concluded that the Amendment "is an appropriate and necessary response to the adverse secondary effects stemming from adult establishments," but "[a]t the same time, . . . continues to provide ample opportunity for adult establishments to locate and operate throughout New York City" (JA351-55). *See also* App. 4a-5a.

After public hearings before the City Council, where there was further testimony about the negative secondary impacts of adult uses, on October 25, 1995, the City Council approved the Amendment and it became effective on that date (JA301-302).

The Permanent Adult Use Zoning Amendment.

The permanent adult use Zoning Amendment ("the Amendment") does not forbid the operation of any category of business, but instead restricts the zoning areas in which an "adult establishment" may be operated (App. 5a). The term "adult establishment" is carefully defined to make clear that the regulations cover only the types of establishments that have been found to produce negative impacts on the communities in which they are located (JA302, JA24-38). An adult establishment is defined as a commercial establishment, a "substantial portion" of which is used as one of four types of facilities: an "adult book store," an "adult eating and drinking establishment," an "adult theater," or "other adult commercial establishment." N.Y.C. Zoning Resolution ("ZR"), § 12-10 (*see* App. C, 39a-40a). These establishments "regularly feature" or devote a "substantial portion" of their stock-in-trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities." *Id.*

"Specified anatomical areas" are defined as: "(i) less than completely and opaquely concealed: (a) human genitals, pubic region, (b) human buttock, anus, or (c) female breast below a point immediately above the top of the areola; or (ii) human male genitals in a discernibly turgid state, even if completely and opaquely concealed." *Id.*; *see* App. 40a. "Specified sexual activities" are defined as: "(i) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (iii) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast." *Id.*; *see* App. 40a; JA302-303. Identical or similar definitions are used in many of the zoning ordinances throughout the country that regulate adult uses (JA303).[2]

The centerpiece of the Amendment is a set of locational restrictions and anti-concentration provisions that are designed to shield the City's residential neighborhoods, and the facilities and commercial areas that serve them, from the negative

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[2] The terms "regularly features" and "characterized by an emphasis on" are used to make clear that the Amendment is applicable only to those establishments where entertainment or material with a predominant focus on sexual activities or anatomy is offered on a frequent, on-going basis (JA303-304). The Amendment is not intended to restrict entertainment or material containing incidental displays of nudity or sexual activity or establishments which offer adult entertainment on an occasional basis (*id.*).

In order to further ensure that establishments offering mainstream, non-adult entertainment are not subject to the restrictions on adult uses, the Amendment also provides that adult theaters, eating and drinking, and other commercial establishments must exclude minors during performances. ZR § 12-10. Adult establishments routinely exclude minors in order to avoid running afoul of the Penal Law's prohibition on the dissemination of indecent material to minors. N.Y. Penal Law, § 235.20 *et seq.*; *see* JA304.

impacts produced by adult uses (JA305). Even before these regulations were adopted, the general regulatory scheme embodied in the Zoning Resolution prohibited new commercial development in the City's residentially-zoned districts (JA305). Under the Amendments, adult uses are also barred from certain districts that are zoned for commercial and manufacturing uses, but, in addition, permit new residential development (ZR, §§ 32-01[a], 42-01[a]). Many of these districts are mapped within residential districts and contain the local retail strips that serve the everyday commercial needs of the surrounding residential neighborhoods (JA305-306, JA28-32).

Adult uses continue to be allowed, subject to certain restrictions in all high-density commercial and virtually all manufacturing districts that are mapped throughout the City and in which a variety of retail, entertainment and other commercial uses are permitted (ZR, §§ 32-01[b], 42-01[b]; JA305-307). In these districts, however, adult establishments must be located at least 500 feet from any school, daycare center or house of worship and at least 500 feet from most zoning districts in which new residential uses are allowed (ZR, §§ 32-01[b], 42-01[b]). In addition, to prevent concentration, in the districts in which adult establishments are permitted, a new adult use must be located at least 500 feet from any other adult use (*id.*, §§ 32-01[c], 42-01[c]); *see* JA307, JA28-32; App. 7a).[3]

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[3] Aside from certain limited exceptions (ZR §§ 32-01[b], [f], 42-01[b], [f]; *see* JA309), the Amendment generally required existing adult establishments that did not conform to the restrictions to come into conformity or terminate within one year of the effective date, *i.e.*, by October 26, 1996 (*id.*, §§ 52-734, 52-77; JA496-97). The Amendment provided that, upon a timely application with the requisite showing by an owner of a non-conforming adult establishment, the City's Board of

(continued...)

While the Amendment affords the people and neighborhoods of New York City a significant degree of protection from the adverse impacts of adult uses, it also provides ample access to adult entertainment and materials for all who desire them (JA309-10). As indicated, adult establishments may operate in a variety of commercial and manufacturing zoning districts that are mapped throughout the City and DCP has calculated that the districts in which adult uses are permitted represent more than 11 percent of the City's total land area, most of which is readily accessible by both car and mass transit (JA309). Indeed, DCP determined that all of the property in Manhattan that is zoned to permit adult uses, and at least 80 percent of the land area in the other boroughs that is so zoned, is within a 10-minute walk from a rapid transit line or a major bus route (JA309).

DCP has also estimated that the Amendment allows for the operation of approximately 500 adult establishments (JA309-10).[4] Under the Amendment, moreover, each such

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[3] (...continued)
Standards and Appeals ("BSA") could allow a non-conforming establishment to be maintained for more than one year from that effective date (ZR § 72-40; JA36-37). However, neither petitioners, nor any other business, chose to utilize this process by making a proper and timely application with payment of appropriate fees. *Stringfellow's v. City of New York*, 91 N.Y.2d 382, 405, 671 N.Y.S.2d 406, 419 (1998).

[4] This estimate takes into account both the limitations on districts where adult uses are permitted and the requirement that an adult establishment be located a minimum distance from certain zoning districts, specified community facilities and other adult establishments (JA309-10). In addition, DCP staff discounted as potential sites certain properties that are unlikely to be developed for any commercial use, including properties occupied with public utilities or oil storage facilities; property designated
(continued...)

establishment may have up to 10,000 square feet of usable floor area (JA310; ZR, §§ 32-01[d], [e], 42-01[d], [e]). Given that approximately 177 adult establishments were operating in the City, and the fact that the vast majority of those establishments occupy far less than the 10,000 square feet permitted, the Amendment permits all of the City's existing adult establishments to continue to operate in the City, either at their current sites or at new locations, and also accommodates a significant expansion of the City's adult use market (JA310).

In sum, the Amendment represents a carefully considered and measured response to the problems associated with adult establishments and is based upon a thorough analysis of the impacts produced by such establishments in New York City and in other municipalities across the country (JA310).

The Action and Defendants' Opposition.

On or about October 10, 1996, almost one year after the Amendment was enacted and mere days before it was to take full effect, petitioners Buzzetti, *et al.*,[5] filed an order to show

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[4] (...continued)
as wetlands by the State Department of Environmental Conservation; publicly-owned vacant property with an area of more than 10,000 square feet; areas under active consideration for a rezoning that would prohibit adult uses; and sites fronting on built roadways (JA309-10).

[5] As set forth in the complaint, plaintiff Adele Buzzetti d/b/a Cozy Cabin is a New York corporation with its principal place of business located at 92-03 Astoria Boulevard, East Elmhurst, New York -- Cozy Cabin is licensed as a cabaret, serving alcohol and featuring live female dancers who perform barechested on stage, and has been operating at the location since 1976 (JA15-16). Plaintiff Vanessa Doe is an adult female over the age of twenty-one years old who performs at the Cozy Cabin (JA16).

cause seeking to preliminarily enjoin the defendants, the City, *et al.*,[6] from enforcing certain provisions of the law (JA6-7, JA22-23). They sought to enjoin those provisions which: 1) define an "adult establishment" as one which "regularly features . . . live performances which are characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities,'" and 2) define "specified anatomical areas" as including the "female breast below a point immediately above the top of the areola" and "specified sexual activities" as including "fondling or other erotic touching of . . . female breast" (JA7).

In the complaint, the first cause of action alleges that by restricting the geographic area where female dancers can perform barechested or in an erotic manner and failing to restrict similarly-situated topless male dancers, the Amendments violate the Equal Protection Clause of the Fourteenth Amendment (JA19-20). The second cause of action alleges that petitioners' rights to free expression under the First and Fourteenth Amendments are violated by burdening women from engaging in, and patrons from receiving, female-oriented erotic expression and not similarly-burdening male-oriented erotic expression (*id.*).

Petitioners submitted an affidavit of Leonore Tiefer, Ph.D., a clinical psychologist specializing in human sexuality and an Associate Professor in the Department of Urology at Montefiore Medical Center (JA242-50). Ms. Tiefer stated that

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[6] The other named City defendants are DCP, the Department of Buildings, the New York City Council, and Rudolph W. Giuliani, Joseph B. Rose, and Gaston Silva, in their official capacities, as the Mayor, the Director of DCP and Chair of the CPC, and the Commissioner of the Department of Buildings, respectively (JA16-17).

widespread commercial opportunities for partially-clothed men to model and dance has constituted a recent development which integrates several trends in sexuality: the increasing marketplace for sex, the demise of double standards for norms of sexual behavior, the commercialization of gay sexuality, and the cult of men's bodies as a source of sexuality (JA242-43). As examples, she cited the development of nightclubs where attractive men dance and strip for women audiences, a Diet Coke television commercial, and various publications (JA245-47). She opined that "it is difficult to see what distinctions can be drawn between the roles of men and women performers in erotic entertainment contexts" (JA250).

Other affidavits were by: petitioner Vanessa Doe, a female topless dancer, who stated that if the law forced most of the places where she worked to close, she would suffer irreparable harm by being severely limited or unable to engage in her chosen form of erotic expression and to earn a living (JA276-78); Carlos Riobo, a male adult, who stated that on September 21, 1996 he visited four clubs in Chelsea, Manhattan, that feature barechested male dancers known as "go-go boys," who all danced in an erotic manner (JA279-81); and Susan Dale Gross, who stated that five years earlier, she visited the former Chippendale's club, which had featured barechested male dancers, and that she was informed that it had reopened as another club featuring male barechested "Chippendale's" dancers on Friday and Saturday evenings (JA282-83).

In their opposing papers and answer, defendants argued that the Amendment is a reasonable and lawful exercise of the City's zoning authority, and that petitioners failed to show a likelihood of success on the merits of their gender-based claims. Defendants relied on the statute, its legislative history, and the underlying planning considerations, as set forth in an

affidavit by Joseph P. Rose, CPC Chairperson and Director of DCP (JA287-311, JA397-400), the DCP Study (JA44-134), and the 1995 CPC Report (JA312-92).

CPC Chairperson Rose recounted the background of the passage of the Amendment and explained that it was carefully drafted to cover only the types of establishments that have been found to produce negative impacts on the communities in which they are located (JA288-311; *ante*, pp. 2-9). Consistent with that purpose, the definitions of "specified sexual activities" and "specified anatomical areas" are tied to activities and physical attributes associated with such establishments and the definitions thus make reference to relevant portions of both the male and female anatomy (JA311).

With regard to establishments featuring barechested performers, CPC Chairperson Rose stressed that the surveys conducted by DCP indicated that the vast majority of topless clubs in the City employ female entertainers exclusively (JA311). Furthermore, according to the studies conducted in New York and other municipalities and the testimony at the numerous hearings that preceded approval of the Amendments, it is those clubs that tend to produce such negative impacts as reduction in the value of nearby properties and impairment of the character of the surrounding community (JA311). Finally, Chairperson Rose stated that, although some establishments in the City offer topless male entertainment, their number appeared to be relatively small and DCP had no evidence that such establishments create the type of negative community impacts that the adult establishments covered by the Amendment tend to produce (JA311).

In addition, the City provided the then-status of the three other pending actions challenging the Amendment facially on numerous grounds (JA284-86).[7] From 1996 to date, those actions were unanimously rejected by every level of the New York state courts, and, most recently, by the Second Circuit.

In relevant part, by judgment entered October 23, 1996, the New York Supreme Court granted the City's cross-motion for summary judgment upholding the Amendment as facially valid and dismissing the three actions. *Stringfellow's v. City of New York*, 171 Misc. 2d 376, 653 N.Y.S.2d 801 (Sup. Ct., N.Y. Co. 1996). The Appellate Division unanimously affirmed the judgment, *Stringfellow's v. City of New York*, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dept. 1997), as did the State's highest court, the New York Court of Appeals. *Stringfellow's v. City of New York*, 91 N.Y.2d 382, 671 N.Y.S.2d 406 (1998).

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[7] In February 1996, two actions were commenced in State Supreme Court: in *Amsterdam Video, Inc. v. City of New York*, the plaintiffs are the owners or operators of over 90 adult establishments, while *Hickerson v. City of New York* was commenced on behalf of several customers (JA284-85). Both complaints alleged that the Amendment deprives them of the right of free expression and other rights protected under the New York Constitution, as well as the rights of free expression guaranteed under the First and Fourteenth Amendments (JA284-85). After defendants removed both actions pursuant to 28 U.S.C. § 1441 and plaintiffs sought a remand, by decision dated June 27, 1996, the District Court remanded all the state constitutional claims, but retained jurisdiction over the federal claims, staying adjudication pending determination of the state claims (JA285; *Hickerson v. City of New York*, 932 F. Supp. 550, 559 (S.D.N.Y. 1996)). In July 1996, the owner of a single adult establishment commenced a third state action, entitled *Stringfellow's v. City of New York* (JA286).

On June 3, 1998, the Second Circuit affirmed a March 6, 1998 judgment of the District Court, which denied a preliminary injunction on the federal claims in the cases, following the New York Court of Appeals' judgment. *See Hickerson v. City of New York*, _ F.3d _, 1998 U.S. App. LEXIS 11593 (2d Cir. June 3, 1998), *aff'g*, _ F. Supp. _, 1998 U.S. Dist. LEXIS 2635 (S.D.N.Y. Mar. 6, 1998), *pet. for rehearing, with en banc suggestion, pending*.

In reply to defendants' opposition, plaintiffs submitted, *inter alia*, a short article by J. Morin under the caption "Male Breast: Overlooked Erogenous Zone," in *Medical Aspects of Human Sexuality*, Vol. 20, No. 3, March 1986, at 86 (JA395-96).

THE DISTRICT COURT'S OPINION

By order entered April 8, 1997, the District Court denied the motion for a preliminary injunction. *Buzzetti v. City of New York*, _F. Supp. _, 1998 U.S. Dist. LEXIS 4383 (S.D.N.Y. Apr. 8, 1997) (App. B, 23a-37a). In a thorough opinion, the Court held that petitioners did not demonstrate a likelihood of success on the merits, a prerequisite to enjoin governmental action in the public interest pursuant to a regulatory scheme (*id.*, 27a-37a)

Relying on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality) ("*Young*") and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) ("*Renton*"), the District Court held that the Amendment, which does not ban adult uses but merely restricts their location, was not viewpoint discriminatory, but rather constituted "a content-neutral time, place, and manner regulation" (App. 28a-31a). Based on the legislative record, it held that the Amendment was designed to

serve a substantial and important governmental interest of eliminating the serious negative secondary effects of adult establishments, such as "preventing crime, maintaining property values, and preserving the quality of the city's neighborhoods" (*id.*, 30a-31a, 36a-37a). The District Court found further that (*id.*, 30a-31a):

> Despite plaintiffs['] contentions, the record does not indicate that the [C]ity was aiming to suppress free expression or to disadvantage women who want to perform barechested, as opposed to similarly situated men. Rather, after careful study[,] the [C]ity decided to regulate the zoning rights of adult establishments in an effort to address the negative impact such establishments have on the surrounding community.

The Court noted that the law's definitions mirror zoning statutes throughout the country which have withstood constitutional scrutiny, citing, as an example, this Court's decision in *Young*, 427 U.S. at 53 (App. 31a).

The District Court rejected the contention that the ordinance is gender-biased in violation of the Equal Protection Clause because it does not apply to such places as Chippendale's where barechested males perform and that the definition of "specified anatomical areas" is impermissibly gender-biased because it does not include the male breast (*id.*, 31a-34a). Preliminarily, "[a]s [even] plaintiffs' expert has noted," American society focuses much more erotic energy on female breasts (*id.*, 33a). The ordinance is aimed at the secondary effects of adult establishments, and, "in our culture the public display of female breasts will have far different secondary effects than the public display of male breasts" (*id.*, 33a). Thus, "Rightly or wrongly, our society continues to

recognize a fundamental difference between the male and female breast (*id.*, 33a)," citing, *inter alia*, *United States v. Biocic*, 932 F.2d 112, 115-16 (4th Cir. 1991) ("[A]natomies that traditionally in this society have been regarded as erogenous zones . . . still include (whether justifiably or not in the eyes of all) the female, but not the male breast").[8]

Finally, citing *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), the District Court recognized the broad discretion afforded legislative bodies in determining which problems to address in enacting regulations (App. 34a-35a). Thus, even if New York City could have enacted broader language or may do so in the future, nonetheless, it was justified in its decision to regulate the zoning of the adult establishments it determined, after thorough review, were the particular cause of the documented secondary effects (*id.*, 35a). The District Court concluded: "The predominate concerns of the City defendants in enacting the Zoning Amendment were with the secondary effects of adult establishments, and not with the content of the expression, nor the gender of the expresser" (*id.*, 36a-37a).

Upon the parties' stipulation (JA451-52), the District Court entered judgment denying declaratory and injunctive relief and dismissing the complaint (JA455-56; App. 9a).

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[8] Furthermore, the District Court (as well as the Second Circuit) noted that, while only the female breast was included, another provision applies only to male genitals in a discernibly turgid state, with such provisions simply recognizing that there are anatomical differences between males and females which in our society elicit different reactions (App. 33a-34a, 13a). The District Court also noted that while petitioners' expert sought to establish that both male and female breasts evoke an erotic response, petitioners did not argue that there are not substantial differences between the male and female breast (*id.*, 34a).

THE SECOND CIRCUIT'S OPINION

In a comprehensive well-reasoned opinion, the Second Circuit unanimously affirmed the District Court's judgment. *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir. 1998), *stay denied*, 1998 U.S. LEXIS 4006 (June 15, 1998) (*see* App. A, 1a-22a).

With respect to the First Amendment claim, the Second Circuit held that the District Court correctly relied on *Young* and *Renton* in rejecting petitioners' arguments, given that, *inter alia*, both those cases involved ordinances substantially similar to the City's, with the definitional terms making reference only to exposed female, but not male, breasts (App. 9a-15a). The Second Circuit held that the City's ordinance comports with that authority and constitutes a content-neutral time, place, and manner regulation, with the ordinance's overall purposes to prevent crime, maintain property values and preserve the quality of life and character of city neighborhoods, which are substantial governmental interests, as in *Renton* and *Young* (*id.*, 13a-14a, 15a). The Second Circuit recognized that the City's reliance on studies from other municipalities was well-placed, but that, in any event, the City went beyond that to conduct its own "detailed study," as well as reviewing previous City studies and testimony at public hearings (*id.*, 14a-15a). Thus, it concluded that, as the District Court found, the City had adequately documented its decision to enact a zoning regulation to help counter the negative secondary effects it believed were caused by adult establishments in the City (*id.*, 14a-15a).

In addition, the Second Circuit held that petitioners failed to show a violation of the Equal Protection Clause (*id.*, 16a-22a). Reviewing the standards governing classifications based on gender articulated by this Court in *United States v.*

Virginia, 518 U.S 515, __, 116 S. Ct. 2264, 2275 (1996) ("*Virginia*"), as well as other leading cases, the Second Circuit emphasized two key principles (App. 16a-17a).

First, while the State must show that the challenged classification serves important governmental interests and that the discriminatory means employed are substantially related to achievement of those objectives, notwithstanding, gender or sex is not a proscribed classification and ". . . Physical differences between men and women . . . are enduring. . .," *(id.*, 16a, citing *Virginia*, 116 S. Ct. at 2276).

Second, the Circuit Court stressed that, as this Court noted in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (plurality opin.) ("*Michael M.*"):

> "because the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require that things which are different in fact . . . to be treated in law as though they were the same, this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."

(App. 17a, quoting *Michael M.*, 450 U.S. at 469 (internal quotation marks and citations omitted)).

Applying these principles to the Zoning Amendment, the Second Circuit concluded that, for the reasons stated in its First Amendment discussion, the City's objectives behind the ordinance are important and that the regulation of female, but not male, topless dancing in the context of the City's overall regulation of sexually explicit commercial establishments, is

substantially related to the achievement of the City's objectives (App. 18a). Thus, the gender-based classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in this case (*id.*, 22a, citations and quotation marks omitted).

Noting that the relevant inquiry is whether the line chosen by the legislature is within constitutional limitations, the Court reviewed the evidence submitted by the City, including CPC Chairperson Rose's uncontradicted affidavit that the City had no evidence that male topless clubs created deleterious negative community impacts (App. 18a-19a). The Court concluded: "New York City carefully studied the contours of the problem it was seeking to address and legislated in accordance with its findings" (*id.*, 19a).

Moreover, and as the District Court pointed out, "numerous courts have recognized that the societal impacts associated with female toplessness are legitimate bases for regulation" (*id.*, 19a-20a, citing, *inter alia*, *United States v. Biocic*, *supra*; *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1278-80 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *Tolbert v. City of Memphis*, 568 F. Supp. 1285, 1290 (W.D. Tenn. 1983)). The Second Circuit noted that the male chest is routinely exposed on beaches, in public sporting events and at the ballet, while, in contrast, public exposure of the female breast is rare in our society, and almost invariably conveys sexual overtones (App. 20a).

As a final note, the Second Circuit aptly pointed out that, " . . . given the City's findings, regulating both male and female topless entertainment might have burdened more expressive activity than necessary, thus creating potential First Amendment problems" (*id.*, 20a-21a, *comparing Schad v.*

Borough of Mount Ephraim, 452 U.S. 61, 73, n.15 (1981); *Erznoznik v. Jacksonville*, 422 U.S. 205, 213 (1975) *with Renton*, 475 U.S. at 52).

By order dated May 14, 1998, the Second Circuit denied petitioners' motion for a recall of the mandate and a stay of enforcement. Following Justice Ginsburg's June 1, 1998 order denying petitioners' application for a stay of enforcement, by order dated June 15, 1998, this Court entered an order which stated that petitioners' subsequent ". . . application for [a] stay addressed to Justice Souter and referred to the Court is denied." *Buzzetti v. City of New York*, 1998 U.S. LEXIS 4006 (U.S. June 15, 1998).

REASONS FOR DENYING THE WRIT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S DECISION IS CORRECT AND IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER CIRCUIT COURT. THE CITY'S ADULT USE ZONING AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT OR THE EQUAL PROTECTION CLAUSE.

Upon review of the Second Circuit Court of Appeals' opinion (App. A, 1a-22a), petitioner does not raise any legal issue deserving this Court's review. Accordingly, the petition for a writ of certiorari should be denied.

(1)

Petitioners' argument that the Second Circuit's First Amendment ruling conflicts with numerous holdings of this

Court, and of the First, Third and Ninth Circuits (Pet. Pt. II, at 12-17) is erroneous. Quite simply, the directly controlling precedent in the instant case is in *Renton* and *Young*. As in those cases, as both courts below held, the City met its burden to show that the Zoning Amendment's legislative purpose was to combat the well-documented and universally well-recognized deleterious negative secondary effects of certain adult establishments. Indeed, as the Circuit Court carefully laid out in its opinion, even assuming petitioners have accurately characterized female topless dancing as conveying, for First Amendment purposes, the "viewpoint" of "female eroticism," the record shows that the City's legislature was not aiming to suppress such free expression, but: "Rather, after careful study the city decided to regulate the zoning rights of adult establishments in an effort to address the negative impact such establishments have on the community" (App. 12a-13a; *see also* App. 10a, citing, *inter alia*, *Young*, *supra*, and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opin.)).

Petitioners' selective presentation of quotations from inapposite cases and their brash argument that the *Renton* "secondary effects" rationale "should not extend" to this case (Pet. at 13-15) is simply overreaching and provides no basis for this Court to grant the writ.

Furthermore, petitioners' heavy reliance on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (Pet. at 16), is misplaced. Therein, this Court found that the City of Cincinnati's differential treatment of commercial and noncommercial speakers placing newsracks on the streets had "no relation *whatsoever*" to its legitimate underlying purpose to limit the number of newsracks. *Id.* at 424 (italics in original). In so doing, as petitioners themselves acknowledge

(Pet. at 16), this Court favorably contrasted the speech at issue therein with *Renton*, where there were substantial negative secondary effects attributable to the speech at issue.

So too, the claimed conflict with other Circuits is non-existent. For example, the decision in *AIDS Action Committee of Mass, Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1 (1st Cir. 1994) (Pet. at 15), is inapposite because it involved a finding that there was differentiation among speakers based upon their message with respect to allowing commercial advertising for public service announcements on City subway and trolley cars.

In sum, as in *Young* and *Renton*, no viewpoint discrimination or content bias is present here. Petitioners' persistence in ignoring the ample precedent regarding the validity of adult use zoning ordinances to help control the serious secondary effects of adult uses is thus totally misguided. *See Renton, supra; see also Hang On, Inc., v. City of Arlington*, 65 F.3d 1248, 1257 (5th Cir. 1995).[9]

Moreover, notwithstanding their protestations (Pet. at 16-17) and as the Courts below recognized (App. 18a-19a), petitioners notably presented no evidence to controvert defendants' affidavits reflecting the content-neutrality of the

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[9] In rejecting a similar challenge to the instant one, the Fifth Circuit also distinguished *Williams v. City of Fort Worth*, 782 S.W.2d 290, 296 (Tex. App. Fort Worth 1989), a state case mistakenly relied on by petitioners (Pet. at 6, 15). Not only was that case decided under the Texas Equal Rights Amendment, which raises gender to a suspect classification, but also the corresponding evidentiary burdens imposed on the City by the Texas state court related to that high standard and the state court's finding that the zoning definition was not content neutral under Texas law, a finding clearly at odds with the federal standards under *Renton*, *Young* and progeny.

regulations and the legitimacy of the City's stated interests in addressing the negative secondary effects of adult establishments (JA445). *See, e.g., City of Tucson v. Wolfe*, 917 P.2d 706, 708-709 (Ariz. 1995), quoting *Craig v. Boren*, 429 U.S. 190, 204 (1976).[10]

Finally, petitioners' argument not only distorts the Second Circuit's and District Court's opinions, but also appears to raise factual or evidentiary issues which this Court does not sit to review. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"). Furthermore, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). These controlling principles thus also warrant denial of this petition.

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[10] In *City of Tucson v. Wolfe*, the Court found that an ordinance requiring covering of portions of the female breast was based not only on differences in physical characteristics between men and women, but also was rooted in societal norms and perceptions associated with those differences. *Id.* at 708-709. Among the evidence submitted in support of the plaintiffs' unsuccessful argument was the same short article submitted by petitioners here, "Male Breast: Overlooked Erogenous Zone," contained in *Medical Aspects of Human Sexuality*, Vol. 20, No. 3, March 1986, at 86 (*see ante*, p. 14; JA395-96). *City of Tucson*, 917 P.2d at 708-709 n.1.

With respect to their Equal Protection argument, petitioners wrongly state that the Second Circuit's ruling conflicts with numerous decisions of this Court (Pet., Pt. I, at 5-12). However, review of the Circuit's opinion and its examination of the precedent from this Court, including *Virginia*, *supra*, indisputably show that there is no such conflict (*see* discussion, *ante*, pp. 17-19; App. 16a-22a). As stated in *Michael M.*, *supra*, a gender classification based on clear differences between the sexes is "not invidious, but rather reflects the fact that the sexes are not similarly situated in certain circumstances." *Id.*, 450 U.S. at 469. Tellingly, petitioners largely rely on the dissenting opinion in *Michael M.* in making their argument (*see* Pet. at 6, 11)

Similarly, petitioners' reliance on Justice Ginsburg's dissenting opinion in *Miller v. Albright*, __U.S.__, 118 S. Ct. 1428 (1998), a case decided after the Circuit Court's opinion herein, to support their argument (Pet. at 10) is misplaced. Most importantly, aside from the distinct context in which that case arose, there is an ample record here supporting the legislative decision to address the secondary effects of female topless dancing. As discussed above, there is no indication that the legislative classification relied on gender stereotyping, but rather rested on the numerous studies throughout the country as to the negative secondary effects associated with topless female adult establishments.

Petitioners' final arguments as to purported confusion in the legal standards for assessing gender discrimination claims and their desire to change the law (Pet. at 10-12) are based on speculation and wishful thinking. They are at odds with a wealth of case law, including from this Court, as discussed by

both the District Court (App. 31a-34a) and by the Second Circuit Court of Appeals in its thorough opinion (*id.*, 16a-22a).

(3)

For all the above reasons, the City's adult use Zoning Amendment does not violate the First Amendment or the Equal Protection Clause.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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